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Supreme Court, U.S.
FILED
SEP 22 1994
OFFICE OF THE CLERK

NO 94 - 185

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RONALD B. ANDREWS,
Petitioner,

v.

ALASKA OPERATING ENGINEERS-
EMPLOYERS TRAINING TRUST FUND,
Respondent.

On Petition For Writ Of Certiorari
To The Alaska Supreme Court

PETITIONER'S REPLY BRIEF

RICHARD H. FRIEDMAN*
JOHN BERNITZ
FRIEDMAN, RUBIN & WHITE
1227 W. 9th Avenue
Suite 201
Anchorage, AK 99501
(907) 258-0704
*Counsel of Record

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INTRODUCTION

Petitioner, Ronald Andrews, seeks review by this Court to redress an erroneous decision by the Alaska Supreme Court that dismissed his state lawsuit for wrongful discharge. Respondent

opposes this petition essentially on the merits of the case. Respondent misstates the nature of Andrews' case concluding that it requires an interpretation of the Employment Retirement Income Security Act of 1974 ("ERISA") Pub. L. No. 93-406, 88 Stat. 1-514, 3001-4082 (codified as amended at 29 U.S.C.A. §§ 1001-1461 (1985 & 1994 Supp.)). Respondent argues that because Andrews' suit involves an interpretation of ERISA, it is preempted by ERISA.

Respondent's argument establishes a straw man argument: if Andrews' case requires an interpretation of ERISA, then respondent would be correct. Andrews, however, is not bringing an ERISA claim. His suit requires interpretation of neither ERISA nor an ERISA governed trust. That ERISA may provide alternative relief for Andrews does not

mean that Andrews brought his suit under ERISA and should not invoke the preemption provision.

Because respondent misstates Andrews' argument it overlooks the existence of grossly divergent lower court opinions, the frustration of the lower courts, and the affect preemption will have on thousands of employees of ERISA governed plans. This petition should be granted to clarify the law on whether ERISA preempts state lawsuits, which do not require interpretation of ERISA, and to preserve the existing state laws that protect employees.

SUPPLEMENTAL STATEMENT OF THE CASE

Respondent makes several factual assertions which compel a response.

Andrews reported Williams, his supervisor, to the Trust's attorney because he suspected Williams of

improperly seeking reimbursement for travel expenses. Appendix A to Petition at 4. In his complaint, Andrews alleges that Williams either received duplicate reimbursement for the same expense or was reimbursed for expenses not related to the Trust's business or both. Appendix A hereto at ¶ 5. Andrews also reported that Williams received cash from his airline tickets by converting them to a lower class of travel and pocketing the difference in fares.

Respondent alleges, as a defense, that Andrews was fired because he wrote a check that exceeded his authority under a Trust Agreement. The Trustees, however, told Andrews that he could write the check in question. Appendix B hereto at 3-4. Significantly, the Trustees, except for Williams, have not testified that this was the reason they terminated

Andrews. Appendix B hereto at 1-3, 5-6, 7. The actual reason the Trustees terminated Andrews is a factual question best left to the jury.

ARGUMENT

I. The Court Should Grant Certiorari Because Expanding ERISA Preemption To State Law Claims Which Do Not Require Interpretation Of ERISA Or ERISA Governed Trusts Would Limit State Created Employee Rights For All Employees Of An ERISA Governed Plan.

Respondent agrees that courts have not yet resolved this issue.[1] Yet respondent argues that the decision by the Alaska Supreme Court will not have a significant impact. The Alaska Supreme Court held that ERISA preempts a state law cause of action, which does not require interpretation of ERISA, simply

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[1] "There have been no reported cases since the enactment of ERISA, nearly twenty years ago, involving this unique combination of facts and relationship." Respondent's Brief In Opposition to the Petition For Writ of Certiorari at 6 ("Opposition").

because there is an alternative cause of action under ERISA. Petition, Appendix A.

The impact of such a holding cannot be overstated. It will preempt a multitude of state law remedies which will either leave injured employees with no redress for their injuries or require that federal courts develop an extensive body of federal common law. General American Life Ins. Co. v. Castonguary, 984 F.2d 1518, 1522 (9th Cir. 1993) ("federal courts would have to invent a federal common law of contracts, torts, property, corporations -- something that would run against the grain of our federal system.").

> If ERISA preempted all state law relating to employee benefits plans, a dangerous vacuum would result. Progressive state legislation would be frustrated and Congress might not fill the void with the necessary federal legislation. Major problem

> areas in employment law could be left unaddressed. The healthy pluralism envisioned by Justice Brandeis would be vitiated. This would be counterproductive to ERISA's objective of furthering, rather than debilitating, progressive employment law.

Gregory, The Scope Of ERISA Preemption Of State Law A Study In Effective Federalism, 48 U. Pitt. L. Rev. 427 at 457 (1987). The holding of the Alaska Supreme Court combined with the absence of a clear decision by this Court threatens a vast number of state laws.[2]

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[2] Respondent incorrectly states that Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 111 S. Ct. 478, 112 L. Ed. 474 (1990) addressed the "pivotal issue" in this case. Opposition at 7. Ingersoll-Rand held that a state lawsuit, which depended upon the existence of an ERISA governed plan, was preempted. Andrews' suit does not depend upon the existence of an ERISA governed plan.

II. Andrews' Case Does Not Require An Interpretation Of ERISA Or The ERISA Governed Plan.

A. Andrews' Suit Will Not Require An Interpretation Of ERISA Provisions Regulating Fiduciaries.

Respondent states that certain ERISA provisions determine "the circumstances under which an ERISA trustee may be properly reimbursed." Opposition at 4. Defendant is correct that there are certain provisions of ERISA which regulate reimbursement of fiduciaries. 29 U.S.C. §§ 1104, 1106(b) and 1108(c). There are also, however, state laws governing fiduciary responsibilities of trustees. A.S. 13.36.070; A.S. 11.46.620. Andrews' suit is based upon these state laws.

The fact that ERISA may provide additional regulation of fiduciary relationships does not mean that ERISA preempts Andrews' suit. See Etheridge v.

Harbor House Restaurant, 861 F.2d 1389, 1404 (9th Cir. 1988). ERISA preempts state laws "insofar as they may now or hereafter relate to any employee benefit plan[.]" 29 U.S.C. § 1144(a). State laws regulating fiduciaries are entirely independent from ERISA. They apply to all fiduciary relationships. Andrews' suit is based on these state laws. It is not based upon ERISA's regulation of fiduciaries. Therefore, Andrews' suit will not require an interpretation of ERISA and, in accordance with the purpose behind ERISA's preemption provision, is not preempted.

B. Andrews' Suit Does Not Depend On The Existence Of An ERISA Regulated Trust.

Andrews' claims are based upon the existence of a trust, but are not based upon the existence of an **ERISA** trust. Alaska law regulates fiduciaries to all

trusts. See A.S. 13.06.050(45). It, thereby, covers both trusts governed by ERISA and trusts which are entirely unrelated to ERISA. Id. Andrews is seeking to enforce Alaska law regulating trusts, not ERISA. While his claim is premised upon the existence of trust, it is not based upon whether ERISA governs the trust.

C. Andrews' Suit Will Not Require Interpretation Of ERISA's Provision Prohibiting Misuse Of Trust Funds.

The alleged misuse of trust funds is a question of Alaska law and does not depend upon ERISA. Alaska law governing trusts requires trustees to properly use funds entrusted to them. A.S. 13.36.070; A.S. 11.46.620. Andrews' allegations, if true, are sufficient to show that Williams breached Alaska law by seeking inappropriate reimbursement of travel expenses.

D. Andrews Will Not Need To Interpret The Terms Of The Trust Agreement.

Respondent alleges that Andrews was fired for exceeding his check writing authority provided in a Trust Agreement. The terms of the document, however, do not control. Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988). Instead, it is the motivation of those who terminated Andrews that determines whether he was fired in retaliation for reporting a breach of fiduciary duties. Id., at 407, 108 S. Ct. at 1882, 100 L. Ed. 2d at 419-420; Eldridge v. Felec Services, Inc., 920 F.2d 1434, 1439 (9th Cir. 1990). Thus, under Lingle, if the Trustees fired him because they thought he was reporting a violation of fiduciary responsibilities, Andrews could maintain his suit. This is true even if Andrews'

report was itself mistaken and Williams was not violating any fiduciary duty. Conversely, Andrews would not be able to maintain his suit if the Trustees fired him without intending to retaliate for reporting a fiduciary violation. The termination would be legitimate even if Andrews was reporting actual, undisputed theft of trust funds. The issue is the Trustee's motivation, not an actual breach of fiduciary responsibility. Id.

E. Alaska Law Provides Public Policy Against A Retalitory Discharge.

Respondent also argues that ERISA is the source of the public policy that Andrews alleges was violated. ERISA, however, is only one source of public policy in the state. Public policy includes "the entire body of law in the state." Luedtke v. Nabors Alaska Drilling Inc., 768 P.2d 1123, 1132

(Alaska 1986). Alaska has a public policy against firing someone for reporting a breach of fiduciary duty. Reed v. Municipality of Anchorage, 782 P.2d 1155, 1158 (Alaska 1989) see also Eldridge v. Felec Services, Inc., 920 F.2d at 1437.

F. ERISA Preemption Provision Was Intended To Preempt Suits Requiring Interpretation Of ERISA: Andrews' Suit Is Not Preempted.

The purpose of the ERISA preemption provision is to provide for uniform interpretation of ERISA covered plans. It is not intended to insulate employers from state court remedies for injury to their employees. See Halifax Packing Co. v. Coyne, Inc., 482 U.S. 1, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987). Allowing Andrews to pursue his claims is consistent with the purpose of ERISA in that they do not interpret ERISA or an

ERISA governed trust. These state law claims will not lead to divergent interpretation of ERISA, and will, therefore, not create a significant burden upon administration of the ERISA governed Trust. The existence of similar provisions or policies under ERISA does not mean that Andrews' suit requires interpretation of ERISA. Allowing Andrews to proceed with his suit will allow employees to enforce state laws enacted for their protection. Improving protection for employees was ERISA's overall goal. Id.

III. The Existence Of An Alternative ERISA Remedy Does Not Preempt Alaska Law.

The fact that ERISA may provide a cause of action for the facts alleged in this complaint does not mean that the ERISA remedy is the only remedy. ERISA provides that any law, which relates to

an ERISA plan, is preempted. 29 U.S.C. § 1144(a). It does not state that alternative state law causes of action, which are unrelated to ERISA, are preempted. It is consistent with the overall intent of ERISA, which is to protect employees, to allow unrelated state laws protecting employee rights to stand. See Pace v. Signal Technology Corp., 417 Mass. 154, 160, 628 N.E.2d 20, 22 (Mass. 1994). To now hold, as the Alaska Supreme Court held, that ERISA preempts all state remedies to the extent a remedy is also provided by ERISA would judicially create broader preemption than envisioned by Congress.

IV. The Alaska Supreme Court's Decision Conflicts With Decisions In Other Jurisdictions.

Respondent attempts to distinguish conflicting cases with immaterial distinctions. Respondent contends that

cases cited by Andrews[3] do not conflict because none of them involve "Section 510", and:

> None of the cited cases required interpretation or application of the fiduciary responsibility provisions of ERISA or of the governing plan document, nor did any involve relationships among ERISA cofiduciaries or public policies codified in ERISA."

Opposition at 9.

Respondent's argument misses the point. The crucial issue is the scope of ERISA preemption -- whether ERISA preempts state law causes of action that do not require interpretation of ERISA or ERISA governed plans. These cases are

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[3] General American Life Ins. v. Castonguay, 984 F.2d 1518 (9th Cir 1993); Clarks v. Coats & Clark, Inc., 865 F.2d 1237 (11th Cir. 1989); Etheridge v. Harbor House Restaurant, 861 F.2d 1389 (9th Cir. 1988); Sorosky v. Burroughs Corp., 826 F.2d 794 (9th Cir. 1987); Lane v. Goren, 743 F.2d 1337 (9th Cir. 1984); Pace v. Signal Technology Corp., 417 Mass. 154, 628 N.E.2d 20 (Mass. 1994); and Cutler v. Phillips Petroleum Co., 71 Wash. App. 511, 859 P.2d 1251 (Wash. App. 1993). These cases are summarized on pages 13-17 of the petition.

significant because they hold that ERISA does not preempt causes of action which do not require an interpretation of ERISA or ERISA governed plans. Respondent attempts to distinguish these cases by arguing that they do not address the specific ERISA provisions, which respondent argues are pertinent here, *i.e.*, ERISA regulation of fiduciary relationships. This is not a meaningful distinction. Andrews is suing under state law, has only alleged violations of state law, and will only prevail by showing a breach of state law. These cases support his contention that ERISA does not preempt this suit because it does not involve an interpretation of ERISA or ERISA governed plans. The cases, therefore, provide contrary authority to the Alaska Supreme Court's decision.

CONCLUSION

For the reasons stated above and in the petition, the Court should issue the writ of certiorari.

Respectfully submitted,

Richard H. Friedman
John Bernitz

Counsel for Petitioner
Ronald B. Andrews

APPENDIX A - EXCERPTS FROM ANDREWS' COMPLAINT

COMES NOW plaintiff, by and through his attorney, Jeffery A. Friedman, of the Law Office of Friedman & Rubin, and alleges the following:

COUNT I

1. The Alaska Operating Engineers-Employers Training Trust Fund (hereinafter, Trust) is a trust fund established pursuant to the Labor Management Relations Act of 1947, as amended. The purpose of the Trust is to provide training and retraining programs for qualified members of the International Union of Operating Engineers Local 302.

2. The Trust is governed by the Labor Management Relations Act of 1947, as amended, the Employee Retirement Income Security Act of

1974, and other applicable federal and state laws.

3. Plaintiff was employed by the Trust as its Administrative Manager from May of 1985 through October 31, 1989. Plaintiff is also a member of the International Union of Operating Engineers Local 302.

4. Between May of 1985 and October of 1989, plaintiff complained several times of improper trust transactions.

5. During this time and while performing his duties as Administrative Manager, plaintiff found documents indicating that one of the Trustees of the Trust, George Williams, may have intentionally or negligently charged the Trust twice for the same trust expenses. These documents also indicated that Mr.

Williams may have charged the Trust for non-trust related expenses.

6. Misuse of Trust funds is a violation of the public policy of the State of Alaska and the United States of America, as well as a violation of the Employee Retirement Income Security Act of 1974. Misuse of Trust funds also has the effect of reducing the amount of training benefits available to plaintiff and other eligible union members.

7. On October 27, 1989, plaintiff informed the Trust's attorney, James Gasper, of the potentially improper reimbursements received by Mr. Williams. Mr. Gasper informed plaintiff that the statute of limitations on a labor-management dispute was two years.

8. On October 31, 1989, plaintiff's employment with the

Trust was terminated. Plaintiff's employment was terminated in order to prevent him from giving information and testifying about the possible misuse of Trust funds.

9. Plaintiff's termination violated the express public policy of the State of Alaska and the United States of America.

10. As a result of the actions described above, plaintiff suffered damages in an amount to be determined at trial, but in any event greater than $50,000.00.

COUNT II

11. Plaintiff realleges the allegations in paragraphs 1-10, above.

12. As a part of the contract of employment between the Trust and plaintiff, the Trust had an

obligation to treat plaintiff fairly and in good faith.

13. As a part of the contract of employment between the Trust and plaintiff, plaintiff had an obligation to report any possible misuse of Trust funds that came to his attention.

14. The Trust breached the covenant of good faith and fair dealing by firing plaintiff for reporting possible misuse of Trust funds.

15. As a result of the actions described above, plaintiff suffered damages in an amount to be determined at trial, but in any event greater than $50,000.00.

COUNT III

16. Plaintiff realleges the allegations in paragraphs 1-15, above.

17. All of the actions described above were taken taken (sic) intentionally, in bad faith and in disregard of plaintiff's rights under the terms of his employment contract, or with reckless indifference to those rights. Accordingly, plaintiff is entitled to punitive damages in an amount to be proven at trial, but in any event greater than $50,000.00.

APPENDIX B - EXCERPTS FROM DEPOSITIONS OF THE TRUSTEES

Deposition of Ben Hermon[1]

Q Why did you decide to fire Mr. Andrews?

A Well, it appeared to me that Ron had discontinued to carry out his duties as training trust coordinator. The last three or four months, at least, that he was there, he just didn't seem to be doing his job at all. And for that reason, I thought that we needed to get someone in there who would carry out the duties of the position.

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[1] This deposition was conducted under oath before a court reporter on June 26, 1992. The excerpts are from pages 15-16 and 31-32 of the reporter's transcripts.

Q What duties was he not carrying out?

A Well, he wasn't -- he wasn't carrying out any of the orders of the chairman of the Short Committee which I belonged to for one thing. He wasn't answering phone calls and I was told that he wasn't doing very much for the trainees at the time either, apparently. Or it seemed to me that Ron had misunderstood his position in the trust that he was getting more -- I would say he was -- he thought that his responsibility was to the union rather than to the trust actually.

The fact that the union had changed hands as far as the

people at the head of it were concerned, the Alberts had gotten in and George Williams had became chairman of the trust. I think that Ron had a hard time realizing that he was working for George and the trust instead of the union. And for that reason, he -- somehow or other, he didn't feel that he should take orders from George and so therefore, he kind of shirked his responsibilities and just didn't do his job.

. . . .

Q You don't recall any questions about whether those purchases were proper, at least not from Ron?

A Well, there was one little thing that I didn't consider

much weight actually, but Ron actually paid for the dozer and it seems like to me the backhoe or something with a check, signing the checks. Whereas he only had authority to sign for $5,000.00 worth, he signed for these items which were considerably more and he shouldn't have done that. That was an impropriety.

But that was the only thing that I remember that was very far out of line. I think the Alberts brought up the question of whether Ron had gone out on his own actually and bought the dozer but he didn't.

He and I and one other person -- I think it was Bob Anders -- went to Tope Equipment and looked over the equipment and

determined that it was apparently in good shape and that it was very worthwhile. The cost of them, I think, was 60 some thousand dollars in that case and so Ron wasn't -- actually he didn't make the determination himself. I think all three of us that were out there and looked at the machine decided that it was the one we wanted and he went ahead and did the buy. He made out the check and paid for it.

Deposition of Michael Brechan[2]

Q Do you recall when it was decided among the management side to terminate Mr. Andrews?

A No. We had this meeting and we took this action.

Q Was there any discussion about taking that action prior to this meeting.

A Not that I recall.

Q Was there any discussion about it at the meeting?

A Yes.

Q What kinds of things were discussed?

A Basically that he had been having considerable difficulty taking directions from the

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[2] This deposition was conducted before a court reporter under oath on June 25, 1992. The excerpt is from pages 22-23 of the reporter's transcript.

trustees and performing those duties and that he had not been working out well in general terms with either the union trustees or the management trustees.

(Pause)

Q Other than the difficulties that you mention before that you personally had with Mr. Andrews, do you know of any things that he was doing wrong that led to his termination?

A Not specifically, no.

Q And was your decision to vote in favor of firing Mr. Andrews based on what you were told during that meeting as well as your own experiences with him?

A Yes, it was.

Deposition of Joseph C. Albert[3]

Q Was there any discussion during the meeting -- and I'm referring to the meeting in which Ron was fired. During that meeting, was there any discussion as to why Ron should be fired, Ron Andrews?

A Same; insubordination, wouldn't follow orders. That was -- everybody there, to the best of my knowledge, understood that.

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[3] This deposition was conducted before a court reporter, under oath on November 19, 1992. This excerpt is from page 28 of the reporter's transcript.